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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

FACEBOOK, INC., a Delaware  
corporation,

Plaintiff/Counterclaim  
Defendant,

v.

BRANDTOTAL LTD., an Israeli  
corporation, and UNIMANIA, INC.,  
a Delaware corporation,

Defendants/Counterclaim  
Plaintiffs.

CASE NO.: 3:20-CV-07182-JCS

**JOINT CASE MANAGEMENT  
STATEMENT**

Date: February 19, 2021

Time: 9:30 a.m.

Judge: Hon. Joseph C. Spero

Courtroom: F

Complaint Filed: October 14, 2020

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Plaintiffs BRANDTOTAL, LTD. and UNIMANIA, INC.

Plaintiff/Counterclaim Defendant Facebook, Inc. (“Facebook” or “Plaintiff”) and Defendants/Counterclaim Plaintiffs BrandTotal, Ltd. and Unimania, Inc. (together, “Defendants”) submit this Joint Case Management Statement, pursuant to Fed. R. Civ. P. 26(f) and the Standing Order for All Judges of the Northern District of California, following the conference of counsel for the parties.

### **1. Jurisdiction and Venue**

This Court has federal question jurisdiction under 28 U.S.C. § 1331 in light of the federal cause of action alleged in the Complaint under the Computer Fraud and Abuse Act (“CFAA”). Similarly, this Court has supplemental jurisdiction over the state law causes of action alleged in the Complaint under 28 U.S.C. § 1367, as those claims arise out of the same nucleus of operative fact as Plaintiff’s federal claims.

All named Defendants have been served with process. This Court has personal jurisdiction over Defendants, and venue is proper in this Court. As an initial matter, Defendants have appeared in this action, have answered the Complaint, and have filed counterclaims, thereby submitting to the jurisdiction of this Court. Similarly, Defendants agreed to this Court’s jurisdiction when they created Facebook and Instagram accounts. Likewise, the Court has jurisdiction over Defendants because they knowingly directed and targeted their conduct at California and at Facebook, which has its principal place of business in California.

### **2. Facts**

Plaintiff’s Statement: Defendants built their business by scraping data from Facebook, in violation of Facebook’s Terms of Service and Instagram’s Terms of Use. To facilitate their violating activities, Defendants developed and distributed internet browser extensions and mobile applications, all designed and programmed to scrape data from Facebook’s protected computers. To conceal their scraping from Facebook’s systems, Defendants, among other things, used the browser of anyone who installed their software as a proxy to access Facebook and engage in automated extraction of data to servers Defendants controlled. The data Defendants scraped

1 included user profile information, advertisements and advertisement metrics, and user  
2 advertisement interest information. This data was scraped from password-protected  
3 locations on Facebook’s Platform. Defendants’ conduct was a clear breach of  
4 Facebook’s Terms of Service and Instagram’s Terms of Use, to which Defendants  
5 agreed, and violated federal and state law as alleged in the Complaint. Defendants’  
6 conduct also put the security and integrity of Facebook and its users at risk.

7 No one disputes that Defendants agreed to Facebook’s Terms of Service, which,  
8 among other things, prohibit Defendants from accessing or collecting data from  
9 Facebook “using automated means” without Facebook’s permission. No one disputes  
10 that Defendants agreed to Instagram’s Terms of Use, which, among other things,  
11 prohibit Defendants from “collecting information in an automated way without  
12 [Facebook’s] express permission.” And this Court has found already that “BrandTotal  
13 used ‘automated means’ to access and collect data from Facebook’s website without  
14 obtaining Facebook’s permission as required by the terms of service”—a practice the  
15 Court found to have “very likely breached Facebook’s terms of use.” ECF No. 63, at  
16 29:19-21; *id.* at n.13. In the end, there is no dispute that Defendants breached their  
17 agreements with Facebook and violated federal and state law through their  
18 unauthorized scraping activities.

19 To this day, Defendants’ wrongful practices continue. During the course of  
20 discovery, Facebook has learned that Defendants continue to access and scrape data  
21 from password-protected locations of Facebook’s Platform, notwithstanding  
22 Facebook’s revocation of Defendants’ access to its protected computers. Moreover,  
23 the removal of Defendants’ browser extension from the Google Chrome Store (the  
24 basis of Defendants’ counterclaims) has not been successful in preventing the ongoing  
25 collection of data in violation of applicable terms. Facebook, therefore, is entitled to  
26 all relief sought in its Complaint—including the issuance of a permanent injunction to  
27 bring an end to Defendants’ unauthorized scraping activities.  
28

1        Defendants' Statement: Defendant BrandTotal Ltd and Unimania, Inc.  
2 (collectively "BrandTotal") is a high-end advertising consulting business, specializing  
3 in social media advertising analytics. With user consent and in exchange for value,  
4 BrandTotal collects data from Facebook and other social media sites relating to users'  
5 commercial advertising interactions. The collection practices do not harm Facebook  
6 and are used to provide valuable transparency regarding corporate advertising. In its  
7 most popular offering, UpVoice, users receive cash incentives for participating in the  
8 program, which merely transmits to BrandTotal information about the advertising the  
9 user encounters as they surf social media. BrandTotal did not conceal this activity  
10 from users, Facebook or anyone else. Instead, BrandTotal advertised UpVoice on  
11 Facebook, and Facebook knew of BrandTotal's data collection for some time,  
12 deeming it "harmless."

13        In October, without warning or discussion, Facebook sued BrandTotal, directed  
14 Google to remove BrandTotal's extension from the Google Chrome Store, and  
15 disabled the Facebook pages of BrandTotal and its principals, claiming BrandTotal  
16 violated its terms of service by "automated" collection of data from its site. Though it  
17 suggested to the Court at the TRO phase that it needed time to vet BrandTotal and that  
18 there were other ways in which BrandTotal could get the relevant data, discovery has  
19 shown this is not the case. Facebook does not make commercial advertising analytics  
20 available to third parties, and uses its terms of service to restrict and preserve its  
21 monopoly over commercial advertising data. At least as it relates to what has occurred  
22 here, Facebook's terms of service are unenforceable and its actions against public  
23 policy.

24        Moreover, Facebook's actions in directing Google to disable BrandTotal's  
25 extensions and revoking access to Facebook's data stream is jeopardizing  
26 BrandTotal's entire business. Its actions have disrupted actual and potential customer  
27 contracts, BrandTotal's ability to raise investment income and forced lay-offs. The  
28

acts are unlawful and unfair and BrandTotal seeks damages under its Counterclaims of tortious interference and unfair competition.

### 3. Legal Issues

The principal legal issues in dispute are:

- Whether Defendants' conduct constitutes a breach of Facebook's Terms of Service and Instagram's Terms of Use.
- Whether Defendants have unjustly enriched themselves at Plaintiff's expense.
- Whether Defendants' conduct violates the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.
- Whether Defendants' conduct violates the California Comprehensive Computer Data Access and Fraud Act, California Penal Code § 502.
- Whether Defendants' conduct interferes with Facebook's contractual relations with its users.
- Whether Defendants' conduct constitutes an unlawful, unfair or fraudulent business practice against Facebook.
- Facebook's entitlement to the relief sought by the Complaint, including monetary damages, an accounting and disgorgement of profits, attorneys' fees, and the issuance of a permanent injunction.
- Whether Facebook's terms of service as interpreted and applied here are unenforceable.
- Whether Facebook has interfered in existing and prospective contracts through its suspension of the Facebook accounts, direction to Google to remove the extensions, denial of access to Facebook's data stream, and interference with users control of their own data.
- Whether Facebook's actions were unlawful, unfair, and fraudulent under California's UCL.
- BrandTotal's entitlement to injunctive relief, damages or other relief.

1           **4. Motions**

2           On October 16, 2020, Defendants applied *ex parte* for a temporary restraining  
3 order. The Court denied Defendants' application on November 2, 2020. On  
4 November 11, 2020, Defendants moved for early expedited discovery, which the  
5 Court permitted on November 20, 2020. On November 23, 2020, Facebook moved to  
6 dismiss Defendants' counterclaims. That motion remains pending and is set to be  
7 heard on the same day as the February 19, 2021 case management conference.

8           The parties anticipate motions for summary judgment, discovery motions, and  
9 pretrial motions. Defendants also intend to move for a preliminary injunction.

10           **5. Amendment of Pleadings**

11           The parties have agreed to a March 22, 2021 deadline to amend pleadings.  
12 Facebook anticipates amending the Complaint. Defendants do not anticipate any  
13 amendments to their pleadings.

14           **6. Evidence Preservation**

15           The parties have reviewed the Guidelines Relating to the Discovery of  
16 Electronically Stored Information and have met and conferred pursuant to Fed. R. Civ.  
17 P. 26(f) regarding reasonable and proportionate steps taken to preserve evidence  
18 relevant to the issues reasonably evident in this action.

19           **7. Disclosures**

20           The parties have agreed to exchange initial disclosures by March 3, 2021.

21           **8. Discovery**

22           To date, Plaintiff has propounded 18 requests for production, 7 interrogatories,  
23 14 requests for admission, and it has deposed two individuals pursuant to Federal Rule  
24 of Civil Procedure 30(b)(6).

25           To date, Defendants have propounded 9 requests for production, 11  
26 interrogatories, 7 requests for admission, and they have deposed four individuals  
27 pursuant to Federal Rule of Civil Procedure 30(b)(6).  
28



**Changes to Limitations on Discovery:** The parties have agreed to the following limitations or modifications of the discovery rules:

- Requests for Admission: 25 per side, inclusive of what has been served already. However, this limitation does not apply to Requests for Admission directed to the authentication of documents.
- Interrogatories: 25 per side, inclusive of what has been served already.
- Requests for Production: 35 per side, inclusive of what has been served already.
- Depositions: 8 fact depositions per side (inclusive of depositions taken to date and of individuals designated for testimony under Federal Rule of Civil Procedure 30(b)(6)), but not including retained testifying expert witnesses. The parties shall have the right to depose any retained testifying expert for up to 7 hours per report (not including reply or supplemental reports).

**Protective Order:** The parties have met and conferred on a proposed protective order, which they intend to present for Court approval in short order. The parties continue to meet and confer on the necessity of a protocol governing the discovery of electronically stored information.

**Proposed Discovery:**

Plaintiff's Statement: Plaintiff intends to seek and has sought discovery—through depositions, interrogatories, document requests, and requests for admissions—on Defendants' operations insofar as they relate to the wrongdoings alleged in the Complaint, as well as Defendants' counterclaims, including discovery on the following topics:

- A complete description of Defendants' methods for scraping data from Facebook and Instagram.
- Revenue generated by Defendants in connection with the activities alleged in the Complaint.



- Identification of any and all accounts Defendants created or otherwise utilized, directly or indirectly related to Facebook's or Instagram's platforms.
- Identification of Defendants' customers, including any agreements, communications, correspondence with, and payments received from those customers.
- Any advertising of Defendants' browser extension services used to scrape data from Facebook.
- Defendants' use of Facebook's marks, including documents that reference Facebook or Instagram as a "participating site."
- Any computer code Defendants have utilized—directly or indirectly—to interact with Facebook's platform, computers, and servers.
- Any computer code Defendants have utilized—directly or indirectly—to conceal the operation of its data scraping from Facebook.
- The identification of any individuals involved in the development of any of the above referenced code.
- Identification and location of data that Defendants' products scraped from Facebook and Instagram.
- Defendants' counterclaims, to the extent any survive dismissal.

Defendants' Statement: Defendants intend to seek and have sought discovery—through depositions, interrogatories, document requests, and requests for admissions—relating to the allegations of Plaintiff's complaint and Defendants' counterclaims, including discovery on the following topics:

- Facebook's policies and procedures as it relates to the collection of information regarding commercial advertising on its site
- The information Facebook does and does not make available on its site as it pertains to advertising
- Facebook's investigation of BrandTotal or its application or extension

- Facebook's reporting to the FTC
- Facebook's claim for damages or other relief in this action
- The ways in which Facebook competes with BrandTotal
- Facebook's knowledge of BrandTotal's customer or investor relationships

## 9. Class Actions

Not applicable.

## 10. Related Cases

There are no related cases or proceedings pending before another judge of this Court, or before another Court or administrative body.

## 11. Relief

Plaintiff: As set forth in the Complaint, Facebook seeks a permanent injunction: (1) restraining Defendants from accessing or using Facebook and Instagram; (2) requiring Defendants to identify the location of any and all data obtained from Facebook and Instagram, to delete such data, and to identify any and all entities with whom Defendants shared such data; and (3) restraining Defendants from developing, distributing, using, and causing others to use browser extensions and other products and devices designed to collect data from Facebook and Instagram, without first obtaining Facebook's express permission.

Facebook also seeks compensatory damages, statutory damages, punitive damages, an accounting and disgorgement of profits, attorneys' fees, and pre- and post-judgment interest.

Defendants: As set forth in the Counterclaims, Defendants seek preliminary and permanent injunctive relief to prevent Facebook from curtailing BrandTotal's access to publicly available information on Facebook's platforms that is essential to BrandTotal's business or otherwise engaging in unfair business practices as described in the Counterclaims and TRO briefing. BrandTotal seeks a declaratory judgment that it is not in violation of any enforceable terms of service and Facebook shall remain

obligated to reinstate BrandTotal's access to and use of Facebook's platforms and the publicly available content on Facebook.

BrandTotal also seeks compensatory and punitive damages, pre and post judgment interest and attorney fees and costs.

## **12. Settlement and ADR**

The parties have engaged in substantive settlement discussions informally. The parties have not engaged in ADR to date. Defendants request a referral to ADR, but Facebook has thus far opposed it. It is Facebook's position that Facebook is happy to engage in settlement discussions with Defendants; but for such discussions to be productive, Defendants must first do the work of determining how it can provide services to its clients without continuing to violate Facebook's Terms of Service and Instagram's Terms of Use.

## **13. Consent to Magistrate Judge For All Purposes**

The parties have consented to have a magistrate judge conduct all further proceedings including trial and entry of judgment. ECF Nos. 15 & 25.

## **14. Other References**

The parties do not believe a reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation is necessary.

## **15. Narrowing of Issues**

The parties do not currently request any bifurcation of issues. The parties are in discussions to determine whether they can agree to any stipulation of facts.

## **16. Expedited Trial Procedure**

This is not the type of case that can be handled under the Expedited Trial Procedure of General Order No. 64 Attachment A.

## **17. Scheduling**

The parties propose the following schedule:

Date	Event
March 3, 2021	Initial disclosures

March 22, 2021	Deadline to amend
September 3, 2021	Non-expert discovery cutoff
September 17, 2021	Initial expert disclosures
October 15, 2021	Rebuttal expert disclosures
November 12, 2021	Expert discovery cutoff
January 7, 2022	Dispositive motion cutoff
February 4, 2022	Motions <i>in limine</i>
February 18, 2022	Joint pre-trial statement
February 18, 2022	Oppositions to motions <i>in limine</i>
March 4, 2022	Pre-trial conference
April 4, 2022	Trial (5-7 days)

## 18. Trial

The parties demand a trial by jury. The parties expect trial to last five to seven days.

## 19. Disclosure of Non-Party Interested Entities or Persons

Plaintiff's Statement: Plaintiff has filed the appropriate certifications required by Civil Local Rule 3-15 and the Federal Rules of Civil Procedure. Plaintiff is not aware of any persons or entities with a financial or any other interest in the subject matter in controversy other than the named parties.

Defendants' Statement: Defendants have filed the appropriate certifications required by Civil Local Rule 3-15 and the Federal Rules of Civil Procedure. Defendants are not aware of any persons or entities with a financial or any other interest in the subject matter in controversy other than the named parties.

## 20. Professional Conduct

All attorneys of record for the parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

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21. **Such other matters as may facilitate the just, speedy and inexpensive disposition of this matter**

The parties have no other matters to bring to the Court's attention at this time.

Dated: February 12, 2021

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**ATTESTATION**

I, Jeff R. R. Nelson, am the ECF user whose ID and password are being used to file this document. In compliance with Local Rule 5-1(i)(3), I attest that concurrence in the filing of the document has been obtained from each of the other Signatories.

Dated: February 12, 2020

/s/ Jeff R. R. Nelson  
Jeff R. R. Nelson